THE TARIFF AND THE CONSTITUTION.

I.

CONSTITUTIONAL debate in this country has always proceeded with amazing swiftness from the opening of controversies to their settlement. The most important constitutional conflict in our history (as to the power of Congress over slavery in the territories) had received a most drastic decision within less than a lifetime of its first serious suggestion, within twenty years of the real opening of the struggle; and the dispute as to Congress' power to protect American industries by high tariffs — undoubtedly second among disputed questions of national authority — fairly began and practically terminated in scarcely more than a dozen years from about 1820. This sketch of the tariff controversy as it referred to the Constitution is therefore chiefly concerned with those few years — giving but brief notice to the period preceding 1820, when the argument on the constitutionality of the tariff had not sufficient interest to procure for it complete and definite statement, and dismissing with a sentence, also, the later period to the present, during most of which the constitutional objection to protective tariffs has reposed in utter neglect, save for its occasional half-serious reappearance in a party platform or over-strenuous congressional debate.

As to the preliminary period, the question was at least implied early in the history of the present national government. Hamilton in his famous report on manufactures in 1791 took for granted the constitutionality of protection by referring to it as "sanctioned by the laws of the United States in a variety of instances," and a House committee in 1804 again implied the existence of this power by regretting that Congress might not encourage manufactures by imposing duties on the

exportation of raw materials.[1] Randolph asserted in 1816 that Congress had power "to regulate commerce and equalize duties on the whole of the United States, and not to lay a duty but with a steady eye to revenue."[2] Though the Constitution is seldom mentioned expressly as permitting or forbidding protection, that policy is frequently opposed during the earlier period as inconsistent with the equal treatment to which all members of the republic are entitled — and this is of course essentially a constitutional argument.[3]

II.

Thus for thirty years the question received only occasional, and for the most part ambiguous, notice. But the year 1820 is a year of transition. The argument is more frequent, yet it still retains the vagueness of earlier days and usually appeals to the spirit of the Constitution.[4] Many of the memorials up to that time make no reference to it on either side,[5] and Clay, speaking in Congress, could pass in contempt Whitman's constitutional argument, "of which, as no other gentleman has relied upon it, I shall leave him in the undisturbed possession."[6]

[1] *State Papers on Finance*, vol. ii. p. 80.

[2] January 1816.—*Annals*, XIV. Congress, 1st session, p. 687.

[3] Tucker, *Annals*, vol. i. p. 291: "They [duties] tend to the oppression of certain citizens and states in order to promote the benefit of other states and other classes of citizens;" Randolph, January 1816 (*Annals*, p. 687), speaks of the tariff system as "a largess to men to exercise their own customary callings for their own emolument; and government . . . . bestowing premiums out of the pockets of the hard-working cultivators of the soil." So also Huger, March 1804 (*Annals*, p. 1205).

[4] *Memorial from the United Agricultural Societies of Virginia*, January 17, 1820, says that the tariff bill was "as inconsistent with the principles of justice as incompatible with the spirit of our free Constitution." Similarly memorials from Merchants and Inhabitants of Salem (January 1820), Citizens of Petersburg, Virginia (November 1820), United Agricultural Societies of certain Virginia Counties (December 1820), Merchants of Philadelphia (November 1820), Virginia Agricultural Society of Fredericksburg (January 1820).

[5] The question was not raised, except as a question of justice between classes, by the Pennsylvania Society for the Encouragement of American Manufactures in their enumeration of objections offered in petitions against protection (April 15, 1820, Appendix to *Annals*, XVI. Congress, 1st session, vol. ii. p. 2411).

[6] April 1820, *Annals*, p. 2049.

In January 1821, however, a report of the House of Representatives Committee on Manufactures, to which had been referred memorials for and against high duties, argued at length for the constitutionality of protection,[1] and in the debate over the tariff of 1824 it received constant attention.

The constitutional question was the subject of more frequent discussion at this time merely as a part of the protection controversy at large, which now came into sudden prominence as certain sections and classes, chiefly northern, showed a disposition to develop the tariff system for protective purposes to a degree previously unheard of, while other classes, more especially southern, prepared to offer the resistance for which there had previously been no occasion.[2]

The manufacturers, whose business grew up during the second war with Great Britain, had strenuously appealed to Congress to save them from the European competition which set in at the close of hostilities. The farmers supported this appeal. The failure of their European market for breadstuffs on the return of peace in Europe impressed them with the desirability of a home market for their products. Lastly, the general distress which followed the panic of 1819 made easy the advocacy of panaceas.[3] The southern leaders, partly because the new tariff policy seemed inimical to southern interests, partly for reasons connected with other public questions, now asserted themselves in opposition to every centralizing tendency. The community of slaveholders, after years of mere vague uneasiness, had suddenly become conscious of their peculiar interests and the danger which threatened their system. It had hardly been

[1] Appendix to *Annals*, XVI. Congress, 2d session, p. 1569.

[2] Hayne, January 16, 1832 (*Debates*, p. 96): "Up to 1824 the question had not been much considered simply because the protection which manufacturers had derived was merely incidental to duties imposed for revenue. The act of 1790 was surely of that character; and even the act of 1816 provided for a diminution and not an increase of duties. But when in 1824 the true character of this system was developed the constitutional objection was plainly and strongly insisted upon."

[3] References to the prevalent distress are frequent in Congress; Baldwin, House of Representatives, April 1820 (*Annals*, p. 1944), speaks of this and asks for a high tariff to stop the flood of importations. So also Gross, p. 1966, and *passim*.

possible that protectionism should become a subject of serious controversy so long as it had had neither aggressive champions nor determined opponents. These prerequisites to a quarrel having been supplied, all available argumentative weapons were brought into use, and the authority of the Constitution could no longer be neglected.

The burden of proof rested chiefly with the protectionists, as the character of the federal union required, of course, that those who claimed for the national government a disputed power must find their warrant in the Constitution. The first passage to which the protectionists appealed is the beginning of Article I, section 8, clause 1, which gives Congress power "to lay and collect taxes, duties, imposts and excises."[1]

On these words the protectionists based two distinct arguments: (1) The grant of power to tax was regarded as specifically conferring the right to use the taxing power for protection to industries, on the ground that by the universal custom of governments its employment for that purpose had become inseparably associated with the power of customs-taxation and with the terms describing that power.[2] It will probably be allowed by most persons, however, that import-taxation suggests the idea of protection much less decidedly than the idea of revenue. In fact, little stress was put upon this argument by most protectionists.[3]

[1] The entire clause is: "The Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States."

[2] Holmes, of Maine, in Congress, January 30, 1832: "That the character of an impost tax was well understood when it was inserted in the Constitution cannot well be doubted, if we consider the men who framed it. It had never been confined to the object of revenues. Great Britain had always exercised this power to protect her manufacturing industry, and was at that time exercising it with a relentless hand to suppress and entirely destroy the infant manufactures of the United States" (*Debates*, vol. viii. part 1, p. 195).

[3] Clay, in Congress, March 1824, after disputing the free-trade interpretation of the revenue clause said: "The gentleman . . . . has, however, entirely mistaken the clause of the Constitution on which we rely. It is that which gives to Congress the power to regulate commerce with foreign nations."

(2) Again, it was said that this clause had conferred upon Congress the power of taxation in its complete and absolute form, at the unhampered discretion of Congress itself as to the motive for imposing the tax.[1] In answer to this proposition it was asserted (*a*) — I think justly — that the power might conceivably be abused, and the fact of a wide discretion on the part of Congress could not relieve its members from the obligation to show that any exercise of the taxing power at all questionable was not an abuse.[2] It might be shown that this exercise of the taxing power was not an abuse, either by explaining the terms of the grant of power to tax with reference to usage, or by showing that some part of the Constitution explicitly permitted protection. But the bare assertion of unlimited authority was insufficient.[3] (*b*) The anti-protectionists had yet another effective objection to the claim, that the revenue clause left Congress unrestrained as to the purpose of imposing taxes. They held that the first part of the clause — "Congress shall have power to levy taxes, etc." — and the second — "to pay the debts and provide for the common defense and general welfare" — were to be taken together, each limiting the other. The power of taxation was said to be limited to "debts," "common defense" and "general welfare," while the power to provide for the common defense and general welfare was understood as permitting

[1] The power to lay and collect taxes, duties, and imposts has no other limitation except that they shall be uniform and that capitation and other direct taxes shall be laid in proportion to the census.—*Report of Committee on Manufactures*, House of Representatives, January 15, 1821; *Annals, XVI*, Congress, 2nd session, p. 1569.

[2] P. P. Barbour, March 1824 (*Annals*, p. 1919), remarks, by way of illustration, that though Congress has the full power to maintain a navy, the maintenance of war vessels merely to give employment to seamen would be an exercise of that power not designed by the Constitution.

[3] It is true that the courts would not presume to question the motives of Congress in enacting a revenue law, but the courts are thus cautious because the legislature could not exercise its powers effectively if it were liable to correction by an extraneous and fallible authority, — not because Congress is supposed incapable of violating the sense of the Constitution in the use to which it applies a constitutional power. If it does employ a constitutional power for a purpose which it was not meant by the Constitution to permit, it acts unconstitutionally even though the courts are prevented by practical difficulties from taking account of the wrong.

not any provision for the general good which Congress might see fit to make, but only the furtherance of the general good by taxation. This restriction of the taxing power to "debts," "the common defense" and "the general welfare" would deny Congress the power of levying protective duties by virtue of a plenary power to tax, and compel the protectionists to seek the disputed power in an interpretation of the terms "common defense" and "general welfare"—thus shifting the dispute to new ground. The protectionists, in denying that the two phrases were connected, asserted that the clause conferred a plenary power to tax and also a plenary power to provide for the general welfare by taxation or otherwise.

A consideration of the whole clause shows that the protectionists were wrong and that the two phrases were united. It would certainly be strange if the power of taxation and a power so different as that of providing in general for the national welfare were united in a single clause, while each succeeding clause (referring to loans, to naturalization, to coinage, etc.) was devoted to a single grant of power. Moreover, the whole clause, including the "general welfare" portion, must refer to taxation, as it begins with the general grant of the taxing power, and concludes with the requirement of equality in taxation, the "welfare" phrase coming between. Finally, the authentic punctuation gives only a comma after "excises," showing that there was a grant of but one power, namely, the power to levy taxes for paying debts and providing for the common defense and general welfare.[1]

The question thus depends on an interpretation of the words, "common defense and general welfare." The first of these phrases, "the common defense,"—military necessity,—seems to have furnished the justification for Calhoun's appear-

[1] The punctuation long customary in copies of the Constitution separates excises by a colon from what followed. In the bitterness of the dispute on this point, Alexander charges (April 1828, *Debates*, vol. iv. part 2, p. 2427) that President John Quincy Adams, while he was Secretary of State in 1818, had garbled the text of the Constitution by inserting a colon after excises in publishing, by order of Congress, the journal of the constitutional convention and the text of the Constitution.

ance in the protectionist column, so far as he looked to any other right than the right of self-preservation for Congress' authority to develop the home supply of articles of which the lack in war might be fatal, and to develop the economic power of the nation at large in anticipation of a war or a "series of bloody struggles" with Britain which seemed to him inevitable.[1]

No one could well deny the propriety of using high duties to encourage certain industries, whether under authority of this clause or of the war power, or even by the right of self-preservation, if high duties were shown to be necessary for this purpose, but the protectionism which has been of importance in American political discussion, and with which we are concerned, has not been confined to such a purpose or ordinarily argued on such grounds.

The phrase referring to the general welfare opened a wider and more difficult field for debate. Protectionists recalled Hamil-

[1] This is the tenor of all his speeches on the tariff of 1816 (see *Annals*, XIV. Congress, 1st session, p. 837, pp. 1331–1332). Randolph summed up Calhoun's view as favoring tariffs "with a view to their military consequences." Calhoun has frequently been charged with allowing the propriety of extreme protection in 1816, impelled by the enthusiasm of the war period, and afterwards receding from this position for reasons of sectional interest, but on a careful examination of his utterances it appears that he kept firmly in mind the rule of moderation which had characterized all previous tariff legislation, even when he appeared as a passionate advocate of tariffs to develop the nation's economic power and thus prepare it for the coming "series of bloody wars" with Great Britain. Calhoun's course in this matter entitles him to admiration rather than reproach. The fierce passions of war, which he felt in their utmost intensity, would have confused a less calm and discriminating mind. The precision with which, in observing a constitutional principle, he limited his assent to the protective policy may be seen from one incident. Calhoun had expressly mentioned cotton and woolen manufactures as proper subjects for protection, with a view to national independence of foreign supplies in time of war. The committee of ways and means had announced that a duty of 20 per cent. on cottons and woolens was sufficient to give all needed revenue. Webster moved, nevertheless, to make the rate 35 per cent. at first, with a gradual reduction to 20 per cent. Clay wished to modify this plan only in detail. But Calhoun opposed the higher rate, as he believed "that the permanent duty of 20 per cent. was ample protection." (*Annals*, XIV. Congress, 1st session, pp. 1271–1272.) The limit fixed by the needs of the treasury was to be the limit of protection. At the same time Calhoun was careful to state that protection should be allowed for military purposes, but "without regard to the interest of manufacturers." (*Annals*, XIV. Congress, 1st session, p. 837.) This seems to exclude altogether the motive usual in protection, of care for purely industrial interests.

ton's declaration that "it is of necessity left to the discretion of the legislature to pronounce upon the objects which concern the general welfare," and that "there seems to be no reason for a doubt that whatever concerns the general interests of learning, of agriculture and of commerce are within the sphere of the national councils so far as regards an application of money."[1] Of course this claim for Congress of unchecked authority to decide what measures were for "the general welfare" meant to the states' rights party a dangerous centralization of power. The tariff question was thus resolved into that more general question as to the whole nature of the Constitution, for the solution of which no criterion existed and on which infinite discussion could by no possibility move any of the disputants from the standpoint of their original interests and prejudices. As a faint attempt to escape from mere assertion and retort, it was declared on the protectionist side that Congress possessed by this clause the power usual to sovereign states, of conserving generally the interests of their citizens. From the anti-protectionist faction came the rejoinder that, while there was indeed a field for the discretion of Congress in the exercise of the taxing power, protection by tariffs clearly exceeded the limit of that discretion, as the tariff bill was not a bill to provide for "the general welfare," but a bill "to tax the people to give rewards and bounties to monopolists and manufacturers."[2] The dread of entrusting absolute authority to Congress through the general-welfare clause had asserted itself before the adoption of the Constitution, and Madison[3] had sought to quiet alarm by asserting that provision for the general welfare was limited to the specific acts — borrowing money, coinage, making war, etc. — enumerated in the later clauses of this section, fixing the powers of Congress.

The evidence of the passage itself confirms this somewhat

[1] Quoted by Stewart of Pennsylvania in the debate of 1828.—*Debates*, vol. iv. part 2, p. 2236.

[2] Alexander, April 1828, *Debates*, p. 2428.

[3] *Federalist*, p. 41; quoted by Alexander in Congress, April 1828.—*Debates*, vol. iv. part 2, p. 2430.

authoritative statement by one of the makers of the Constitution. (*a*) The words referring to the payment of debts certainly do not confer any distinct power, not only because the payment of debts is a most obvious and ordinary employment of revenues and needs no express statement in addition to the general power to tax, but also because one later clause expressly requires the payment of the revolutionary debt, while other clauses—especially that which permits borrowing—evidently by themselves imply an expectation that debts will be paid. If the phrase "to pay the debts" confers no distinct power, the same view must be taken of the phrase as to the "general welfare," for the similar position of the two phrases shows that they serve the same purpose in the sentence. (*b*) Again, the political purposes which Congress might think essential to the general welfare and which it might realize by the power of revenue to sustain, or the power of tax-burdens to destroy, have almost the scope of political omnipotence. If the authors of the Constitution meant by the clause under discussion to confer upon Congress an authority so vast, they would have expressed the grant in unmistakable terms, giving it a prominence which should call attention to its important character, and a definiteness which should obviate the need of labored interpretation. In point of fact, the reference to the general welfare is inconspicuously placed—a mere parenthesis in a long clause—and so ambiguously expressed that it is at least not unreasonable to take provision for the general welfare as including all the activities of the national government which it is the chief purpose of the Constitution, in the following clauses, to define. The members of the convention would not thus carelessly have bestowed unlimited power upon a governing body whose most fundamental characteristic was careful limitation of power. The phrases "to pay the debts," "to provide for the common defense and general welfare," if taken as conveying no distinct power, are still not meaningless, as they together constitute a summary of the purposes for which money would be needed under the further provisions of the Constitution.

Madison's interpretation of the general-welfare clause, if it be accepted, shifts the point of discussion once more — this time to that one among the clauses granting powers to Congress upon which protectionists have relied most frequently and with the greatest appearance of justification, viz., the clause giving power to regulate foreign commerce. The argument is evidently the same, whether the clause is taken independently, or, according to Madison's suggestion, as explaining the general-welfare clause. Protectionists interpreted the expression "to regulate commerce" as including interference with commerce by taxation for the advantage of the nation's industries,[2] while by opponents of protection the regulation of commerce was taken literally, as meaning only legislation affecting solely the exchange of products with foreign nations. Protective tariffs, it was objected, had reference not to commerce but to manufactures. More than that, protection was effective only so far as it put a check upon commerce. "Are regulation and annihilation synonymous terms?" Hayne asked. "Does one include the other, or are they not rather opposite and does not the very idea of regulation exclude that of destruction?"[3]

The protectionists justified their interpretation by a voluminous historical argument. The phrase "to regulate commerce," it was said, had acquired by usage a special significance implying an interference with trade for the advantage of home industries; the powers of Europe almost universally shaped their commercial legislation to this purpose and the colonies had in some instances followed their exam-

[1] Art. I, sec. 8, clause 3.

[2] Shepard of North Carolina, January 1833 (*Register of Debates*, ix. part 2, 1453). Massachusetts legislature, *State Papers on Finance*, vol. v. p. 599. President Jackson's message, December 1830: "The states have delegated their whole authority over imports to the general government without limitation or restriction, saving the very inconsiderable reservation relating to their inspection laws. The authority having thus entirely passed from the states, the right to exercise it for the purpose of protection does not exist in them, and, consequently, if it be not possessed by the general government it must be extinct."

[3] Hayne, April 1824, *Annals*, XVIII. Congress, 1st session, vol. i. p. 648. So Mangum of North Carolina, February 1832 (p. 307).

ple.[1] Further, it was alleged that a chief motive in forming the union had been the wish to establish a system of protective tariffs. The states of the Confederation had been unable singly to retaliate against England's unfriendly legislation and there had arisen a demand for action by the representatives of the whole nation in Congress. Citizens of Massachusetts had sent a petition to Congress in which they recited the restrictions imposed by England, and asked that "the numerous impositions of the British on the trade and exports of these states may be forthwith contravened by similar expedients on our part, else, may it please your excellency and honors, the commerce of this country, and of consequence its wealth, power and perhaps the union itself, may become victims to the artifices of a nation whose arms have been in vain exerted to accomplish the ruin of America." The legislature of Pennsylvania about the same time passed a resolution favoring the grant to Congress of power over commerce, on the ground that the states acting separately injured each other and could not retaliate against foreign nations.[2] Congress had in vain asked power to raise revenue by duties on imports and to retaliate by forbidding importations from unfriendly nations,[3] this referring specifically to Great Britain. A letter from Washington to a friend in Great Britain had shown the prevalence of this sentiment: "They (the people) now see the indispensable necessity of a general controlling power and are addressing their respective assemblies to grant it to Congress."[4] The states in adopting the Constitution had kept this purpose in mind. In the Massachusetts constitutional convention[5] Mr. Dawes had favored granting to Congress the powers enu-

[1] The legislature of Ohio, February 1828, asserted that the power to protect the industries of its citizens was claimed as *an incident of sovereignty* by every independent nation.—*State Papers on Finance*, vol. v. p. 885.

[2] Similar petition from Boston (MARSHALL'S *Washington*, vol. v, p. 77), and a letter by Mr. Adams to the same purpose (quoted by Holmes, January 30, 1832).—*Debates*, vol. viii. part 1, p. 199.

[3] Resolution of April 30, 1784.—Cited by Holmes; *Debates*, vol. viii. part 1, p. 199.

[4] MARSHALL, *Washington*, vol. v. p. 77.

[5] See Dawes's speech in the Massachusetts Convention.—ELLIOT, *Debates*, vol. ii. p. 57; quoted by Forward, March 27, 1828, p. 2021.

merated in the proposed Constitution, for the especial reason that the manufacturers "had received no encouragement by national duties on foreign manufactures and they never can by any authority in the old Confederation."

Even before the complete organization of the new government petitions to Congress demanded the establishment of a protective system, showing that such a system was expected to follow the adoption of the Constitution.[1] The protectionists further fortified themselves in this position by showing that many of those men who had been influential in the movement for a more perfect union regarded the Constitution as permitting the enactment of protective-tariff laws. Their opinion as to its meaning was properly given great weight.[2] A considerable number of the members of the constitutional convention were in the first Congress, which as its first important act passed a bill which is a protectionist measure by the terms of its preamble.[3]

The enemies of the protective system maintained that the regulation intended in forming the Constitution was merely the enactment of retaliatory tariff laws, the establishment of a well-ordered system for procuring customs-revenue which the national government urgently needed, and general provision for the commercial interests of the nation as a whole.[4]

The principal positive argument on the anti-protectionist side is a protest, in various forms, against the unequal pressure of the tariff upon different sections and classes. It was sometimes

[1] A Petition of Tradesmen, Mechanics and others of the town of Baltimore, April 1789, asking protection to manufacturers, speaks of "the happy period . . . . when the adoption of the general government gives one sovereign legislature the sole and exclusive power of laying duties upon imports; your petitioners rejoice at the prospect this affords them that America, freed from the commercial shackles that have so long bound her, will see and pursue her true interest, becoming independent in fact as well as in name." Similarly the *Mechanics and Manufacturers of New York*, April 18, 1789.

[2] See, *e. g.*, Washington's speech to Congress December 7, 1796, and Madison's message of December 5, 1815.

[4] Cassedy of New Jersey, April 1824 (*Annals*, p. 2149). Davis of Massachusetts, March 13, 1828 (*Debates*, p. 1882).

[4] Alexander (*Debates*, p. 2425), April 19, 1828; Mangum, February 1832 (*Debates*, p. 304–305).

asserted that protective tariffs were forbidden by the last words of the revenue clause considered above, which require that "all duties, imposts and excises shall be uniform throughout the United States." [1]

This passage certainly does not apply to the case of protective tariffs. It requires uniformity in the application of a tax, but it does not require equality of incidence. Such a requirement would of course be absurd, as no indirect tax falls equally upon taxpayers possessing or consuming unequal amounts of the article taxed, and this applies as well to purely revenue duties of which no one doubted the constitutionality.

With much more reason the tariff was denounced as conflicting, by its unequal incidence, with the spirit of the Constitution and of free government. "The Constitution having placed all the people on the same plane, its principles cease to operate when the law elevates one class or depresses another." [2]

The most elaborate statement of the objection to protection on the score of equality was the so-called "export-tax theory," according to which a tax on importation is essentially identical with a tax on exports, as by lessening the net value of the imports received in exchange for exports it in effect lessens the value of the exports and falls on the producer of the exports. The cotton planter, it was said, produces manufactured goods by raising cotton and exchanging it for them; the northern manufacturer produces manufactures directly, but the cotton planter, as an exporter, is taxed on his production while the northern manufacturer is free from any such tax. Thus, it was asserted, the cotton planter received for each 100 bales exported only the value of sixty bales because 40 per cent. of the return cargo was intercepted at the custom-house.

[1] Miller of South Carolina, February 1832 (*Debates*, p. 440); Alexander (quoting Jefferson), April 1828 (*Debates*, p. 2426).

[2] Philadelphia Chamber of Commerce (*State Papers on Finance*, vol. iv. p. 482).
Similarly Cambreleng, New York, February 1824 (*Annals*, p. 1577).
Citizens of Boston, October 2, 1824 (*State Papers on Finance*, vol. iv. p. 468).
Randolph, April 1824 (*Annals*, p. 2366).

This proposition pointed to a real grievance, but as an economic theory it was altogether fallacious. The exporting planter suffered by the duties, but the consumer of imports paid the tax. The prices of imported goods were determined in a world-market, and it was not in the power of American consumers, by any probable diminution in their demand, to lower prices and thus compel the foreigner to bear the burden. As a consumer the planter bore the tax, but in this he merely shared the fortune of other consumers and had no special reason for complaint. So far, however, as the duty lessened the American demand for foreign goods, it thereby diminished the quantity of American products necessary to the equilibrium of international trade, and so restricted the sale abroad of cotton or other products of the United States. The planter was practically unable to diminish the supply of cotton in order to protect himself against a fall in prices, as the fields which had been employed for raising cotton would generally continue in the same use however unprofitable it might prove to be. Though the hardship inflicted upon the planters was severe, the theory which was meant to describe that hardship — the theory that the exporting cotton planter paid the tax on imports — was inaccurate. Strictly speaking the consumer paid the tax in an addition to the price of the imported article; the loss to the planter from the interference with his export trade did not result from a shifting to the planter of the tax upon the imported goods, as the planter's loss gave no relief to the consumer of imports, but was an injury altogether additional to that which the consumer sustained.

By another application of the export-tax theory, suggested rather than strongly urged, the tariff, as equivalent to an export tax, was considered contrary to the clause of the Constitution in which export taxes are expressly forbidden. It is probably true that (aside from the tendency of taxes to stay where they are first imposed) the incidence of import and excise taxes is somewhat similar, being determined in each case by the play of reciprocal demand; but this admission does not militate against the constitutionality of import duties, in view of the fact that the authors

of the Constitution considered them in some respects unlike and carefully limited the prohibition to export duties.[1]

To the inequality of tariff burdens was added an inequality of benefits from the tariff; the planter had no direct share in the bounties of the protective system. His protest was answered by a futile effort to disprove a serious inequality in the pressure of the tariff. It was urged that those sections which seemed to lose by the tariff received in the long run a more than compensating benefit. Protection would ultimately lower prices instead of enhancing them. Moreover the prosperity of the protected section's industries would communicate itself to other sections and employments. Whatever force there may have been in these arguments the anti-protectionist contention was in large measure true.

III.

The foregoing pages present in substance the chief arguments on the two sides of the dispute. It remains to attempt a conclusion as to the whole question at issue. Reasons have been offered which seem sufficient for rejecting all the arguments on both sides with two exceptions: the protectionist argument that the regulation of commerce must be understood as including restrictions upon trade with a view to protection, and the anti-protectionist argument that the sectional inequalities in the effects of the tariff were inconsistent with the purpose of general welfare for which the Constitution had been established. It will appear that these two arguments are vitally connected, so that the following discussion of the commerce clause will incidentally afford ground for a decision of the question whether the inequality of which the South complained constituted, in fact, a violation of the Constitution in letter or spirit.

There seems to be no substantial reason for doubting that

[1] The best presentation of the theory is by McDuffie (*Register of Debates*, vol. vi. p. 843, and *House Report No. 279*, XXII. Congress, 1st session). See answer in minority report, *ibid.* See also Clay's speech in the Senate, February 2, 1832, and *Niles Register*, August 30, 1828.

the authors of the Constitution meant by the "commerce" clause to permit protective duties. The fact seems unmistakable from the argument of the protectionists which is quoted above, and to which further evidence might be added almost indefinitely. Usage abroad and at home had familiarized the citizens of America with the idea of protective tariffs, and the association of this idea with the phrase "to regulate commerce" appears in the general economic discussion of the time, as well as in the discussion referring specifically to the new Constitution.[1]

Aside from all other evidence, it would be almost sufficient to cite alone the discussion at the first session of Congress, which, reflecting the national sentiment no less than the deliberations of the Constitutional Convention, resulted in the enactment of a protective-tariff law without any suggestion that such action was unconstitutional.[2]

But, as I shall attempt to show, the protectionism of the "American system" was different in kind and degree from the protectionism of 1789, and a justification of one need not sanction the other. In the controversy over the "American system," the anti-protectionists were wrong if they meant, as a few of them did, to deny the constitutionality of all protective tariffs, and wrong if they hoped to find in the terms of the Constitution any palpable limitation upon the use of the protective power; but they were right in saying that the peculiar tariff policy which developed about 1820 was an innovation, that the sentiment of the nation when the government was founded would not have tolerated such a system, and that there-

[1] Madison, in his letter to Joseph Cabell, September 18, 1828, shows that the phrase "to regulate trade" was generally used with a reference to protection. Franklin, before the House of Commons, in 1766, distinguished between the right of Parliament to lay duties "to regulate commerce" and a right to lay duties for revenue, the right to lay duties for revenue being denied. The same distinction as to Parliament's power and the same use of terms appears throughout the whole dispute on colonial taxation (see *e. g.*, Pitt's speech of January 14, 1766, on the "Right of Taxing America;" Burke on "The Taxation of America." Choate discusses this use of terms in a speech on the tariff, March 14, 1842.

[2] See the debate in the *Annals of Congress*, vol. i.; also MR. WILLIAM HILL'S paper on "The Protective Purpose of the Tariff Act of 1789," in this JOURNAL, December 1893.

fore the Constitution of 1787—supposing it to represent the will of the nation—could not be taken as positively sanctioning the later system.

The essential difference between the old and new policies may be shown concretely by contrasting the tariff legislation of 1789 and that of 1824. In making this comparison it is to be remembered that the tariff legislator may take account of three distinct interests: (1) the public revenue; (2) the interests of the domestic producer of such goods as are taxed on importation; (3) the interests of the consumer. With reference to protection, accordingly, he has a choice of three policies: (1) He may consider only the needs of the treasury, levying duties so far as possible upon articles not produced in the country, and thus altogether excluding the purpose of protection and sparing the consumer any burden of increased prices on domestic products; or (2) he may allow the protective purpose to enter in entire subordination to the purpose of procuring revenue, favoring the producer and oppressing the consumer in but a slight degree; or, lastly, (3) the purpose of protection may be a prime motive. In the last case, very high duties are imposed upon articles produced also at home. The producer is greatly benefited, the consumer is greatly oppressed, and even the revenue is sacrificed, as excessively high duties act as a check upon importation.

The tariff of 1789 was of the second class. Its chief purpose was revenue; the interests of the producer were not allowed such weight as at any point to cause a sacrifice of revenue, or seriously to oppress any class of consumers. But the act of 1824 was calculated, by its high rates and by the choice of articles for heavy taxation, both to oppress extremely a great number of consumers and deliberately to relinquish considerable amounts of revenue which might have accrued from a system of lower duties. The predominance of the revenue purpose in the one case and of the protective purpose in the other may be proven by the explicit declarations of the men who framed each bill and by an examination of the two acts. From the debate of

1789, as quoted in the *Annals*, it does not appear that even the leading protectionists — much less the members of Congress as a whole — meant to allow precedence to the protective purpose. Fitzsimons of Pennsylvania, to whom the departure from a purely revenue bill was primarily due, regarded protection as of secondary consequence in the act as a whole. He said that he "agreed with the gentleman from Virginia [Madison] that the leading considerations of the business were the necessities and wants of the Union and the means of relieving them."[1] Even the list of enumerated articles which Fitzsimons offered in introducing the subject of protection was not prepared with a view to protection merely. After speaking of the desirability of protection, he adds that an enumeration is also more favorable to the purpose of revenue (mentioning several reasons) and continues: "It being my opinion that an enumeration will tend to clear away difficulties [*i. e.*, difficulties in the fiscal administration mentioned in the preceding sentence], I wish as many to be selected as possible; for *this purpose* I have prepared myself with an additional number."[2] Madison interpreted Fitzsimon's list as being offered with a view to revenue,[3] and Fitzsimons seems to have accepted this interpretation. He did not object to it, though Madison's remark immediately followed a speech of his own and was thus especially directed to him. By expressing a general agreement with Madison two days later (as quoted above) he seems to have given positive assent to this interpretation of his plan. The fact that in Fitzsimon's policy the purpose of protection was subordinate would alone furnish a presumption that the act of 1789 was only incidentally protective, as Fitzsimons was the principal representative of the advanced protectionism of his time. This estimate of that legislation is confirmed, however, by the declaration of other protectionist leaders. Boudinot said, more

[1] *Annals*, vol i. p. 120.

[2] *Annals*, vol. i. p. 106.

[3] Madison said (p. 115) that he supposed Fitzsimon's list, like his own, was meant to include those articles which "were capable on the principle of policy of bearing a higher duty than was left on the common mass to be taxed ad valorem."

than once, that the object was to raise revenue.[1] Sherman said: "The objects are to pay the debts and provide for the general welfare of the community. The first of these objects I take to be that we pay our debts." On the other hand, there was no denial of such assertions. If the fact had been open to question, statements like those of Fitzsimons and Sherman would have been disputed.

Aside from explicit declarations that the purpose of protection was merely incidental to that of revenue, several incidents in the debate of 1789 unmistakably implied that fact. The question of limiting the duration of the act was discussed for two days in May, but the effect of a limitation was considered without reference to protection.[2] Even the proposal to limit to a year or two called forth no protest from the protectionists, some of whom expressly favored a limit. Sherman, for example, wished to continue the act only "until the debt is discharged,"[3] and Fitzsimons himself seconded a motion to limit to a certain day "unless otherwise provided in the act for the appropriation of revenue," making the duration of the duties dependent solely upon purely revenue legislation.[4] On May 8 Tucker led an attack against the bill upon the ground that its rates were in general too high. In a two days' discussion which followed, protection was scarcely referred to. When the bill had returned from the senate, the question whether its rates were too high gave occasion to another general discussion of the principles of the bill, but the short summary of the debate given in the *Annals* does not show any argument whatever of a protectionist character.[5]

In 1824, the occasion for legislation was a flood of petitions

[1] Page 127; same statement, p. 216, protection mentioned as a departure from the principal (revenue) purpose of the act.

[2] There is one trifling exception to this: Madison made a passing reference (p. 346) to the "encouragement of a particular description of people . . . . for the protection of whom the public faith seemed pledged," but the relative unimportance of this consideration he indicated immediately by enumerating the purposes in view as including only the needs of government and the public credit.

[3] P. 355. [4] P. 364. [5] Pp. 454–5.

asking for protective duties. The tariff bill reported by the Committee on Manufactures was the response to these petitions. The discussion turned almost entirely upon the question of protection, considerations of revenue entering scarcely at all except as it was suggested that high protective duties would diminish the revenues. The protectionists of this later day, in sharp contrast with those of 1789, made the encouragement of producers their prime purpose, preferring it to considerations of revenue, and to the interest of consumers. Chairman Tod, speaking for the bill, recognized the probability that the protective rates would, in some instances, lessen the revenue, but he counted upon other duties to compensate for the loss. Even if there should be a *net* loss of revenue, "that would be *no reason*" against enforcing the protective policy.[1] "The bill, at all events, would do no fatal injury to the revenue in one or two years.[2] Clay quoted, approvingly, an opinion of Napoleon, that "duties . . . . should not be an object to the treasury."[3] Other speakers expressed like sentiments, but Clay and Tod may fairly be regarded as representing the prevailing protectionist ideal. The proposed sacrifice of the fiscal interests and the interests of the consumer was carried to the point of excluding certain important articles by prohibitory duties. Tod referred to the duties on the principal articles in the bill as prohibitory, and mentioned especially woolens, hemp, glass, and iron. Buchanan so far dissented as to ask that the producers of cotton bagging should still be left under a fair competition with foreigners. Tod said that "if the gentleman voted throughout on that principle, he must vote against the whole bill,[4] and Clay lamented that the bill had received an attack from "so unexpected a quarter."[5] At other points in the debate Clay referred to his policy as "the prohibitory policy."[6] If it were not necessary to consult the South, "can there be a doubt," he asks, "that the restrictive system would be carried to the point of prohibition of every foreign fabric" which the United States could

[1] P. 1478.
[2] P. 1589.
[3] P. 1995.
[4] Pp. 1546–7.
[5] P. 1548.
[6] P. 1989.

produce?[1] The argument of the opposition also assumed that the bill was in considerable part prohibitory, and it was opposed for that reason.[2] Both Hayne and Webster protested against the prohibitive policy as an innovation.[3]

In the debate of 1789 prohibitory duties had scarcely been mentioned. Sherman wished a prohibitory duty on manufactured tobacco, and the rate which he suggested was imposed,[4] but this was more probably a sumptuary than a protective restriction.[5] A prohibitory duty of nine cents on beer was proposed, but the rate was fixed at only five cents.[6]

The two completed acts are as strongly in contrast as the expressed purposes of their authors. In the act of 1824 the legislators seem to have regarded only the interests of the producer; no burden has been thought too heavy for the unlucky consumer of protected goods. But the burden imposed upon the consumer by the act of 1789 is altogether insignificant. High protective duties in the earlier act are to be sought, if anywhere, in the enumerated list of articles taxed at specific rates. This list is here exhibited in three classes, with the ad valorem equivalents of the specific duties.

In class (a) appear articles taxed mainly or solely for revenue:[7]

Rum 22 per cent.; other spirits 8 or 9 per cent.; molasses 10 per cent.; tea (Bohea) 17 per cent.;[8] sugar 14–16 per cent.;

[1] P. 1998.

[2] Webster, p. 2043; Hayne, p. 618.

[3] Pp. 620 and 2055.

[4] *Annals*, vol. 1, p. 167.

[5] There can hardly be any other reason for imposing a prohibitory duty upon tobacco alone out of the whole multitude of imports. Tobacco was frequently denounced as a superfluous luxury by the moralists, of whom Sherman was a pronounced example. On the other hand, there was no need of protecting the tobacco industry. Sherman's motive is not shown by the *Annals*, however, and the question is not free from doubt.

[6] P. 144.

[7] The prices used in estimating these rates ad valorem have generally been calculated from the reports of 1789–90 and 1790–91 of the quantity and value of articles exported from the United States.—*State Papers on Commerce and Navigation*, vol. i, pp. 24 and 143.

[8] Price for 1793 from the *Report of Massachusetts Bureau of Labor* for 1885.

cocoa 11 per cent.; coffee 16 per cent.; wines *ca.* 14 per cent.; salt 24 per cent.; playing cards 166 per cent.

In class (b) are articles produced in the United States so cheaply and abundantly that neither the domestic producer nor consumer need be greatly concerned at the admission or exclusion of the foreign product, especially crude agricultural products or commodities but little removed from the condition of raw materials: malt 16 per cent.;[1] cider, bottled, 20 per cent.; ale, beer, and porter (not bottled) 25 per cent.;[2] tallow candles 25 per cent.; spermaceti candles 15 per cent.; wax candles 12 per cent.; soap 25 per cent.;[3] indigo 18 per cent.; snuff 28 per cent. or more; manufactured tobacco 40 per cent.; fish, dried or pickled, 25 per cent.;[4] cheese 60 per cent.

In class (c) are manufactured articles, most of them not produced in the United States in sufficient quantities so that duties on them would have the characteristic effects of protective duties in benefiting the producer at the expense of the consumer: boots and shoes 8 or 10 per cent.; cables and cordage 10 per cent.; twine 9 per cent.; steel, unwrought, less than 5 per cent.;[5] nails 6⅔ per cent.;[6] cotton and wool cards 12 (?) per cent.; coal 10 per cent.;[7] hemp 8½ per cent.; cotton 12 per cent.; beer, ale, and porter (bottled) 10 per cent. Of the

[1] Price taken from a government report of 1810 (*State Papers on Finance*, vol. ii. p. 713). Some of the prices in this report are evidently unreliable. It was a disputed question whether any malt was imported (*Annals*, i. 156).

[2] Neither cider nor ale, beer, and porter (not bottled) were important imports, but, on the contrary, they were exported. See *State Papers on Commerce and Navigation*, vol. i., and the *Report of the Massachusetts Bureau of Labor*, 1885, p. 162.

[3] Price for 1792 in the *Report of the Massachusetts Bureau of Labor* for 1885.

[4] HAMILTON (*Works*, vol. iii. pp. 55–6) suggested repealing the duties on pickled fish. So little would be imported that the duties would probably not equal the expenses of administration.

[5] According to HAMILTON, *Works*, vol. iii. p. 55.

[6] The average price of nails calculated from a statement in the *State Papers on Commerce and Navigation* (vol. i. p. 144), was 15 cents in 1790–1. This agrees with a statement of prices of nails at Albany, in 1787, given by BISHOP, *History of Manufactures*, vol. i. p. 538.

[7] Coal should perhaps have been put in class (b) though it was of no importance wherever classed, being neither imported nor consumed in the United States to any great extent.

ad valorem duties the highest is a duty of 15 per cent. on carriages. This class of articles was chosen for high taxation because they were regarded as luxuries. The same motive accounts for the choice of several of the articles in the list taxed at 10 per cent., viz., knee buckles, gold and silver leaf, and lace. Thus the ad valorem schedules include no protective duties above 10 per cent., and few so high as 10 per cent.[1]

A comparison of this act and that of 1824, with respect to the following points, will show how freely the later act in comparison with the earlier one, favored the producer at the cost of the consumer. (1) In the act of 1789 the typically protective duties upon articles whose exclusion meant benefit to the American producer and loss to the consumer were few — only about a dozen — while in 1824 the protective duties were not merely numerous, they constituted practically the entire act. (2) In 1789 the strictly protective duties were low — none of them except those on cards and cotton rising above 10 per cent., while the tax on cotton was rather a revenue than a protective duty, as the United States was not then practically a cotton-producing country,[2] and the card industry was in no danger from competition. The protective duties in the act of 1824 were extremely high. Wool, which had been free in 1789, was now taxed 15 or 30 per cent., according to quality; woolen goods at 33⅓ per cent. Cottons, at 25 per cent., with a 30 cent minimum, bore an actual charge of from 25 per cent. to more than 50 per cent. Shoes were taxed at 25 cents per pair, against seven in the act of 1789. Leghorn, straw and chip hats 50 per cent., with a minimum valuation of $1 each. Articles of general consumption other than clothing had also come to be heavily burdened: window glass at $3 to $4 per hundred square feet, amounting often to more than 100 per cent.; nails at five cents — the equivalent, at actual prices, of more than 66 per cent.,[3] or

[1] The attitude of the legislators toward carriages is shown by the imposition of an internal tax on carriages in 1794.

[2] See HAMILTON'S *Report on Manufactures.*

[3] This is calculated according to prices of nails given by SWANK, *Iron in All Ages*, p. 514.

ten times the ad valorem rate of 1789. Cables and cordage had been advanced from 75 and 90 cents per 112 pounds in 1789 to $4.48 and $5.60. Glass, iron, woolens, hemp, and cotton goods were mentioned as especially fit for the application of the prohibitory policy. The rates proposed for this purpose by the committee were imposed by Congress without change, upon nails and spikes, rolled and cast iron, anchors, iron cables and chains, and iron and steel wire; also upon window glass, cut glass, and glass, n. e. s. As to woolens, cottons, hemp, and products of hemp, the committee had to yield somewhat, but in each case the duties were greatly advanced over those of 1816. (3) In 1789 the protective duties did not affect a large part of the expenditure of most consumers. So great was the reluctance even of protectionists at that day to augment the chief items of ordinary private expense that it had been hardly possible to impose even the insignificant duties on nails and steel, though these are not articles of the first importance to the ordinary consumer. The vast sum of woolens imported (£1,481,378 from Great Britain in 1790)[1] was allowed to reach the consumer unburdened by more than the general duty of 5 per cent. But in 1824 the chief articles of clothing, which constitute about 15 per cent. of an American workingman's outlay, coming next to food in this respect, were loaded with taxes as described above. The protectionist legislator had thus taken possession of a new domain more important than any which he had claimed before. The low duties on shoes in 1789 were the nearest approach, but by no means a near approach, to the later heavy exactions from the consumers of foreign cloth.

In the act of 1789, again, the relative importance of the revenue motive is shown by the fact that while the clearly revenue duties ranged from just below 10 per cent. up to 24, the clearly protectionist duties ranged from about 10 per cent. down to 5, the highest duties in either class being that on salt, a typically revenue duty, and on playing cards, a sumptuary and revenue tax. In the act of 1824, however, there are no revenue duties

[1] PITKIN'S *Statistics*, p. 267.

whatever (the earlier duties on revenue articles being left unchanged), and, as already observed, there were many high duties which were avowedly expected almost or quite to exclude imports and therefore to sacrifice revenue.

The comparatively moderate character of the early tariff policy might almost be assumed *a priori*. A system of protection to manufactures such as would burden consumers can hardly be established in a community of which the manufacturing class constitutes but an insignificant fraction. Protection is justified by its supporters as directly or indirectly benefiting all classes, but probably this doctrine never gained popularity until it had been advocated by a numerous, influential, and directly interested class.

To sum up, then, a system extremely oppressive by the number of its protective duties, their rates, and the importance of the articles taxed—in particular weighing intolerably upon the southern planter, and deliberately causing a great loss of revenue—such a system was to be substituted for one in which the chief purpose had been the acquisition of revenue, and by which (except from revenue taxation) no class of consumers was appreciably inconvenienced.

The question at issue in the "twenties" was whether the Constitution permitted the novel system, described above, of violent interference with revenue receipts and private expenditure, not whether protection at all was allowable. The facts and authorities by which the protectionists of that day attempted to justify the innovation do not sustain them. If we consider their arguments in order, it is to be noticed, first, that the familiarity of the revolutionary fathers with high protective tariffs in Europe, and in several of the American states, may be cited to show the *general* significance of the words "to regulate commerce," but the specific degree of restriction allowed by the known sentiment of the nation in 1789 cannot be inferred from the usual practice of other nations or even from the practice of the American states. The union included states presenting the utmost diversity of economic interests and of commercial regulations. It is suffi-

ciently obvious that the Constitution of the composite nation could not be created by a process of arithmetical addition — by enacting for the union whatever had been pleasing to one or several of the states.

As a second argument, Clay's followers alleged that a chief purpose in forming the union was the purpose of giving Congress control over commerce, interpreting the control of commerce as meaning their own policy of protection. In fact, however, the deficiency of the old Constitution (aside from the matter of revenue) was the lack of power in Congress to retaliate against England's restrictions upon our trade, and to retaliate in behalf of the shipping interest — not in defense of manufactures.[1]

As to the testimony of the fathers of the Constitution, those leaders upon whose evidence Clay's school chiefly relied have in most cases clearly indicated the opinion that protection was to be permitted only as the policy of other nations compelled an exception to the ideal freedom of trade,[2] and where they allow duties for the ordinary protectionist reasons, the protection which they sanction is always moderate. Washington's opinion is typical in this respect: "Though I would not force the introduction of manufactures by extravagant encouragement and to the prejudice of agriculture, yet I conceive much might be done in the way by women, children and others, without taking one really necessary hand from tilling the earth."[3]

[1] That the proposal to give the Confederation Congress power over commerce refers to revenue or retaliation and not to protection may be seen from the stock instances cited by protectionists as proving that the power of protection was suggested. See Report of Jefferson, Gerry and others on the necessity of Congress being allowed to regulate commerce, ELLIOT'S *Debates*, vol. i. p. 107; *Resolutions of Congress*, April 30, 1784, asking power to forbid importation, etc., *ibid.;* also the repeated proposals to give power to levy duties on imports, and the memorials by legislatures and citizens of states cited above (p. 50 *et seq.*); report of Monroe's committee on same subject, July 13, 1785, ELLIOT'S *Debates*, vol. i. p. 111; Randolph's statement of the defects of the old Constitution, ELLIOT, vol. v. p. 127. Holmes of Maine, in the Senate, January 30, 1832, attempts to prove that protection was intended in the formation of the new union, but none of his quotations antedating the Philadelphia convention refer expressly to protection.

[2] *E. g.*, Hamilton in the *Report on Manufactures.*

[3] Letter to La Fayette, January 29, 1789.

Among the great leaders of his day Hamilton probably approached most nearly to the Clays and Tods, but even he argued against sacrificing the consumer and the mercantile interest by heavy taxes upon the necessaries of life, when it was possible, consistently with collection of the tax, to increase the duties on wine, spirits, tea and coffee.[1] Finally, as has been shown, the later protectionists are not entitled to refer for justification to the authors of the act of 1789. It may perhaps be said, however, that the Constitution clearly confers the power of protection, but does not place any limitation upon the height of duties or upon the importance allowed to the protective relatively to the revenue features of tariff legislation. This is true if we regard only the terms of the written Constitution, but the question which Clay disputed with Hayne and McDuffie involved facts more fundamental than the words of a written constitution.

A multitude of local interests — agricultural, trading, manufacturing — and a multitude of political and economic opinions — democratic and monarchical, physiocratic and mercantilist — had been so far reconciled as to permit the formation of a common Constitution. This process of fusion implied compromise at every point of difference, and a written instrument had purported to make plain the terms of compromise at some points but not at all. Much of this remaining uncertainty was due to the inevitable deficiencies of language, much to the need of leaving for later definition — by legislation or otherwise — what the convention could not have attempted to define without becoming involved in hopeless discord. Among points thus left unsettled it did not appear from the text of the Constitution what degree of advantage should be allowed to the rising manufactures from the "regulation of commerce" and what corresponding burdens imposed upon the agricultural and commercial interests. Apparently the Constitution did not impose any limitation upon this power. Nevertheless, a limitation did exist; and it was both definite and authoritative. The people of the United States expected moderation in the enactment of protective tariffs.

[1] Report on Public Credit, *Works*, vol. iii. p. 33.

That this was tacitly understood may be assumed, first, from the most obvious and essential facts of the whole political situation. The control of commerce was to affect interests so diverse and so jealous of each other that the right of Congress to exercise such control at all had been granted only with reluctance and after years of refusal. It goes without saying that the federal compact would never have been formed if the Carolinas and other states of the South had anticipated the suggestion of prohibitory duties on their principal imposts, and that the union would speedily have fallen to pieces if such tariffs had been proposed soon after its formation.[1]

The understanding that only moderate protection could be allowed was not merely tacit, however. In the debate on the tariff of 1789 it was recognized throughout and at no point even impliedly questioned that favors to the manufacturing interest must be narrowly limited, out of regard for agriculture, trade and shipping, so that the system should not bear severely upon any class or section.[2] For this reason, plainly expressed, the duties on one article after another were fixed at low rates.

The debate on the tariff proved the existence of this sentiment of moderation, and the tariff act expresses definitely the terms of compromise which the nation desired to impose upon the contending interests. Hamilton has left a statement that public opinion, and more particularly the powerful influence of the mercantile class, forbade a system of extremely high duties, and that the limit of tolerance had been reached in the act of 1789.[3]

[1] The danger to the Union from high duties is many times suggested in the debate of 1789; *e. g.*, Ames: "If the revenue system should fall with oppressive weight on the people, if it shall injure some in their dearest interests, it will shake the foundations of the government."—*Annals*, vol. i. p. 297.

[2] See, *e. g.*, remarks by Fitzsimons, *Annals*, vol. i. pp. 120–1: also pp. 147 and 148; Hartley, p. 110; Madison, p. 148; Boudinot, p. 216, and elsewhere.

[3] "*It need scarcely be observed* that the duties on the great mass of imported articles have reached a point which it would not be expedient to exceed. There is at least satisfactory evidence that they cannot be extended further without contravening the sense of the body of the merchants." He continues that it would not be wise to ignore this class, considering, among other reasons mentioned, "the greatness of the innova-

This act was to be regarded as scarcely less canonical than the Constitution itself; first, because it definitely established a compromise which the parties to the federal compact had indefinitely assumed; because, second, as expressing the will of the whole nation, it enjoyed substantially the same sanction as the Constitution. Its principle of moderation was nowhere questioned—there were no Tods in those days. Finally, in 1824, or even in 1816, if we choose this date for the new policy, the agricultural and trading interests had for a generation enjoyed exemption from the burdens of an extreme protective system, not by accident, but because they had demanded exemption and it had been deliberately granted. If the opposite policy had been pursued, if the manufacturers had been allowed high protection during that period, they would now have claimed that the policy had been established by force of prescription, but there is no reason why prescription should not have force in establishing a negative as well as a positive policy. The planters and merchants might, therefore, with reason have claimed exemption from high protective duties, as a prescriptive right.

"Incidental protection"—protection occasioning no great hardship to consumers, and allowing first importance to the purpose of revenue, but not the protectionism of Henry Clay—was sanctioned by the Constitution as the Constitution's creators, the American people of 1789, understood it. The objection to the later protectionism, as violating the spirit of the Constitution by its inequality, was well grounded; the protectionist argument from the "commerce" clause was insufficient to justify the extreme form of protection.

But the later protectionism soon acquired the sanction which at first it had lacked. The will of the nation, which is of course ultimately the groundwork of the national Constitution, had changed as the industrial character of the nation changed, as the manufacturing class came to outweigh, not in numbers, but

tion which, in this particular, has already taken place in the former state of things." Accordingly he thinks any increase of revenue should be procured by higher duties on spirits.—*Report on the Public Credit*, December 1790.

in the importance of their contribution to the composite national will, not only the agricultural class but also the commercial class, under whose control and for whose advantage chiefly the power had been conferred upon Congress "to regulate commerce." The political Constitution shaped itself to the new economic organization by a forced interpretation of the written instrument, as effective as formal amendment and much less likely to awaken opposition.

The opponents of protection were soon defeated, although they kept up a pretense of resistance. In February 1832 Clay refused to spend time on the constitutional question,—"It had been sufficiently debated."[1] Dickerson a few days before had said: "As to the violation of the Constitution by these laws, that delusion has nearly passed away, and upon that I have nothing to say."[2] Senator Miller, of South Carolina,[3] refers to the statement by "all those on the other side that the constitutional question had been waived." Hayne himself in effect acknowledged the defeat by omitting the question altogether from a general debate against the tariff, and after he had taken his seat rising to remark that he had overlooked it in the hurry of debate, but declining to consider it now beyond a mere formal protest against unwarranted legislation.[4] At another time, in a speech of seven pages, he does not mention the constitutional objection in his formal enumeration of reasons for opposing the tariff, but characterizes it as "utterly unconstitutional"—putting these two words parenthetically in the middle of a sentence. Brown, of North Carolina, said[5] he "did not deem this a proper occasion to go into that question," but adds that a government which takes from one class to give to another is despotic, etc. Benton's testimony that the constitutional argument had lost force is probably the most unmistakable: "But as arguments drawn from that instrument [the Constitution] have latterly fallen into disrepute or insignificance, I shall make no further

[1] *Debates*, p. 263.

[2] P. 164.

[3] February 21, 1832, p. 440.

[4] January 1832, pp. 104–105.

[5] In March 1832; *Debates*, p. 675.

reference to it." The South's helplessness so far as regarded appeals to the Constitution left her only a choice between acquiescence in the new tariff system or redress through a law higher than the Constitution—the right of revolution.

South Carolina alone accepted the alternative of revolution. The express refusal of the other southern states to countenance South Carolina's action was in effect their ratification of the new system as lawful under the Constitution. This fact was decisive. There can be no more unmistakable test of constitutionality than the acquiescence of the nation at large, and acquiescence need mean only submission—even under protest—in preference to revolution. In consenting to a compromise the protectionists merely refrained from asserting the power which, in view of South Carolina's isolation, they undoubtedly possessed and might at any time assert. The course of years and the repeated enactment of protective-tariff laws has of course long since placed their constitutionality beyond all doubt.

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